93-837

No. ——

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

LOCAL 667 (A Union affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America),
Petitioner,

v.

A. PETER THORNE, STEVEN M. BROOKSHAW, BILL CHISM, OTIS L. WHEELER, TERRY GLASER, GERALD KELLY and BILL NUTT,
Respondents.

Petition for a Writ of Certiorari to the Court of Appeals of Tennessee Western Section at Jackson

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is Respondents' cause of action preempted by the Labor Management Relations Act, 29 U.S.C. Sections 151 *et seq.*?

(a) Does preemption require dismissal because the jurisdiction lies exclusively with the National Labor Relations Board?

(b) If the National Labor Relations Board does not have exclusive jurisdiction, should Federal Labor Law be applied?

LIST OF PARTIES

The parties to the proceedings below were the Petitioner and the Respondents A. Peter Thorne, Steven M. Brookshaw, Bill Chism, Otis L. Wheeler, Terry Glaser, Gerald Kelly and Bill Nutt. Another Defendant, McLean Trucking Company initially participated in the trial court and the Court of Appeals of Tennessee, Western Section at Jackson, but filed for bankruptcy before the Court of Appeals of Tennessee issued its decision. Counsel for Petitioner is not authorized to state whether or not McLean Trucking Company desires to participate in this Petition, or considers itself an interested party.

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PETITION FOR A WRIT OF CERTIORARI

The petitioner, Local 667 (A Union affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America), properly known as Highway and Local Motor Freight Employees Local Union No. 667, affiliated with the International Brotherhood of Teamsters, AFL-CIO, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals of Tennessee, Western Section at Jackson, entered in the above entitled proceeding on April 29, 1993.

OPINIONS BELOW

The opinion of the Court of Appeals of Tennessee, Western Section at Jackson, dated April 29, 1993 is reprinted in the appendix hereto at p. 1a.

The order of the Court of Appeals of Tennessee, Western Section at Jackson was also filed April 29, 1993. A copy of that order is reprinted in the appendix hereto at p. 14a.

Petitioner filed, with the Supreme Court of Tennessee at Jackson, an application for permission to appeal. This application was denied by the Supreme Court of Tennessee on September 7, 1993. A copy of said order is reprinted in the appendix hereto at p. 16a.

JURISDICTION

Alleging State Court jurisdiction, Respondents brought this suit in the Circuit Court of Tennessee for the Fifteenth Judicial Circuit at Memphis (now the Circuit Court of Tennessee for the 30th Judicial District at Memphis), alleging a breach of contract arising out of the employment relationship between Respondents and McLean Trucking Company and alleging a breach of fiduciary duty and the tort of fraud, misrepresentation, and deceit against Petitioner Local 667. Petitioner filed a motion for summary judgment and motion for dismissal on the grounds of preemption, the six months statute of limitations and the merits. The Circuit Court of Tennessee for the Fifteenth Judicial District at Memphis, on February 8, 1985, entered an order granting Petitioner's motion for summary judgment on the ground that Federal Law preempts that Court from exercising further jurisdiction in the cause. The Circuit Court made no ruling on the question of the statute of limitations or the merits. Please see that Court's order at appendix, p. 17a.

McLean's motion for summary judgment was also granted.

Respondents appealed. After argument of the case before the Court of Appeals of Tennessee, Western Section at Jackson, McLean filed for bankruptcy. The automatic stay prevented a decision from the Court of Appeals of Tennessee until, in 1993, Respondents obtained permission from the Bankruptcy Court to proceed against Petitioner.

On April 29, 1993, the Court of Appeals of Tennessee, Western Section at Jackson vacated the Trial Court's granting of summary judgment and remanded for further proceedings. Please see appendix, p. 1a.

An application for leave to appeal was filed by Petitioner with the Supreme Court of Tennessee at Jackson and was, on September 7, 1993, denied. Please see appendix, p. 16a. No petition for rehearing was filed.

The jurisdiction of this Honorable Court to review the judgment of the Court of Appeals of Tennessee, Western Section at Jackson, is invoked under 28 U.S.C. Sect. 1257(a).

STATUTES INVOLVED

28 U.S.C. Sect. 1257. State Courts; Certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

29 U.S.C. 152(11) "The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay

off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

29 U.S.C. 158(b) "It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership; * * *"

29 U.S.C. 160 "Prevention of unfair labor practices—Powers of Board generally

(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction

over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this subchapter or has received a construction inconsistent therewith.

Complaint and notice of hearing; answer; court rules of evidence applicable

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided,* That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. * * *"

29 U.S.C. 185 "SUITS BY AND AGAINST LABOR ORGANIZATIONS

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties. * * *"

HOW THE FEDERAL QUESTION WAS RAISED

At the earliest stage of the proceedings below, Petitioner raised the issues of Federal preemption under the National Labor Relations Act as amended, the six months statute of limitation and the contention that the Respondents' complaint did not have merit. Petitioner filed, with the Trial Court, a motion for judgment on the pleadings and/or summary judgment of dismissal. (Appendix 32a) This motion was based on the merits, the six months statute of limitations contained in the Labor Management Relations Act, as amended, and preemption by the Act granting exclusive jurisdiction to the National Labor Relations Board and requiring that federal labor law be applied. A similar motion was filed by McLean Trucking Company. Both motions were supported by affidavits as well as the Respondents' complaint and affidavits filed on behalf of Respondents. The Trial Court granted the motions of both Defendants on the issue of preemption, concluding that Federal Law preempts the Court from exercising further jurisdiction in this cause and granting Petitioner's motion for summary judgment on the issue of preemption. The Trial Court did not rule on the question of the six months statute of limitations and did not rule on the motion for judgment on the merits. (App., p. 17a.)

STATEMENT OF THE CASE

McLean Trucking Company was a common carrier of freight by truck and was an employer under the terms of the National Labor Relations Act as amended. Petitioner is a labor organization under said act and it is located in Memphis, Tennessee. Respondents were dispatchers working at McLean's Memphis, Tennessee terminal.

Their primary duty was dispatching the over-the-road drivers on their runs. Petitioner represented certain employees of McLean Trucking Company at Memphis including the over-the-road drivers, but did not represent the dispatchers. Dispatchers with similar duties have been represented at other trucking companies.

About March or April of 1983, management officials of McLean at Memphis changed the work schedule for Respondents so that they were scheduled to work seven (7) days then have seven (7) days off. There may have been other conditions which were changed. Respondents objected to this change. They attempted to prevail upon management to keep the old schedule but to no avail. Respondents then decided to join the Petitioner. They signed authorization cards, but these applications were not voted on and Respondents never actually became members of the Petitioner Union. C. R. Boyd, a Business Agent employed by Petitioner, on April 11, 1983, sent a demand letter to McLean demanding recognition as collective bargaining agent for Respondents and demanding that they be included in the existing unit covered by the National Master Freight Agreement. Please see exhibit "B" to affidavit of William Robert Davidson, App., p. 38a. The affidavit of R. Jack Koontz, a McLean Management Official, states, "The basis of disloyalty to the company was from their attempt to join Local 667 which also represents the rank and file workers." App., p. 34a. Both affidavits were filed in the Trial Court in support of McLean's Motion for Summary Judgment.

Upon learning that Respondents had signed the authorization cards, McLean's management called them into a meeting and asked them to withdraw their Union applications. As a consideration for the withdrawal of the applications, McLean promised that there would be no retaliation for signing authorization cards then or in the future and further promised to reinstate the work schedule that the Respondents desired. A contract was drafted and signed incorporating this collectively bargained agreement.

Respondents then withdrew their membership applications from Petitioner and worked under the old schedule. Prior to April 15th, the date of the agreement, Respondents had not been supervisors. This fact is established by their complaint and affidavits filed on their behalf in the Trial Court.

After the signing of the agreement, McLean surreptitiously began to give some indicia of supervisory capacity to Respondents. For instance, management officials would have a warning letter to a driver typed and would bring it to one of the dispatchers and tell him to sign it. Respondents have consistently contended that they were not supervisors and the Union was not aware that they were supervisors, and still contends that they were not.

In August of 1983, McLean, in violation of its contract with Respondents, reinstituted the objectionable work schedule. Respondents again attempted to get McLean to rescind this change but to no avail. Respondents then went to the Union to sign membership cards. Respondents contend that they were assured by Union Representatives that, if McLean retaliated, charges would be filed with the National Labor Relations Board and Respondents could be reinstated with backpay. The Union denies that such statements were made. It is further the position of the Union that Respondents denied any indicia of supervisory status.

After the new membership application cards were signed on August 23rd, 24th, and 25th, 1983, the Union sent a demand letter asking for recognition and bargaining on behalf of Respondents. Upon receipt of the demand letter, McLean fired all the dispatchers.

The Union filed a petition for an election with the National Labor Relations Board and also filed a charge on behalf of the Respondents because they were fired for their Union activity. The Regional Director dismissed both the petition and the charge after concluding that the evidence produced by McLean indicated that the Respondents were, in fact, supervisors, and therefore had no protection under the Act. Both decisions were appealed. The National Labor Relations Board denied the request for review on the petition for the election, and, on December 14, 1983, General Counsel denied the appeal from the Regional Director's refusal to issue complaint on the charge.

Respondents were discharged August 31, 1983. They did not file suit until August 28, 1984.

Respondents never filed, with the National Labor Relations Board, a charge against the Union.

The Complaint filed by Respondents in the Trial Court stated that it was an action for breach of contract arising out of the employment relationship between Respondents and Defendant McLean Trucking Company and further charged McLean with fraud, misrepresentation and deceit, as well as retaliatory and wrongful discharge in violation of public policy. Respondents further allege that, when McLean changed the working conditions in April of 1983 requiring them to work longer shifts, they joined together in a concerted effort to protest the changes in the working conditions.

They state that, when McLean agreed that it would not discipline them in any manner for signing Union cards they withdrew the cards and entered into a contract with officials of Defendant McLean. They allege that, beginning immediately after signing the April 15th, 1983 agreement, McLean gave the appearance that they had some authority to discipline over-the-road truck drivers. They deny that they actually had such authority. Their Complaint states that, prior to April of 1983 they did not have the expressed or apparent authority to discipline road drivers and that McLean intentionally and fraudulently took steps to give the appearance that Plaintiffs had the power to discipline road drivers so that the National Labor Relations Board would decline to hold an election in the future.

They allege that McLean terminated their employment and terminated them for signing Union cards, and that this constituted a breach of the contract entered into on April 15th, 1983. They aver that their termination was caused solely by the malicious and intentional actions of Defendant McLean without just cause and in contravention of Respondents' contract rights and public policy.

They allege that McLean's actions were contrary, not only to State but to Federal public policy. They state that McLean's representatives made representation that there would be no discharge or retaliatory action for signing the Union authorizations and that McLean knew that the representations were false but were made in order to forego a Union election which would have afforded them protection under the National Labor Relations Act.

Their complaint alleges that Union Representatives told them that if they signed Union authorization cards they would not be subjected to any reprisals by the Company and if reprisals were administered, the National Labor Relations Board would reverse all such actions. They claim that, because of these representations, they signed the authorization cards, as a result of which they were damaged through loss of employment. (App., p. 19a.)

Thus, Respondents have brought into play two elements which bring their cause of action within the ambit of the Labor Management Relations Act, as amended, and within the jurisdiction of the National Labor Relations Board. They have alleged a breach of the collective bargaining agreement which they, as a result of their concerted activity, entered into with the Employer, McLean. They have also alleged an unfair labor practice against Petitioner which allegedly brought about their termination. Not only is this arguably a charge that the Union, through its efforts to have supervisors included in an existing unit, brought about the Company decision to terminate the supervisors, but it also, without question, is a charge of failure to represent in good faith.

The Trial Court, basing its decision on the pleadings, the affidavits, exhibits, and oral argument of counsel, concluded that Federal Labor Law applied, granted Petitioner's and McLean's motions for summary judgment and dismissed Respondents' cause of action on the basis of preemption. Respondents appealed.

The Court of Appeals of Tennessee concluded that there was no preemption, that the National Labor Rela-

tions Board did not have exclusive jurisdiction, and that Federal law should not be applied. Holding that Respondents had a remedy under state law, the Tennessee Court of Appeals vacated the judgement of the trial court and remanded the case. Even though petitioner asked the Tennessee Court of Appeals to consider the issue of the six months statute of limitations and the merits, which had not been ruled on by the Trial Court, the Court of Appeals declined and did not rule on those issues. Although, in its opinion, the Court of Appeals discussed prior decisions of this Honorable Court, it distinguished those cases, and concluded that it could see no way that a supervisory employee pursuing the tort claims here asserted would impinge upon the Federal scheme of labor management relations.

That Court also stated that we had not suggested what relief, if any, could be granted under the act or other Federal regulations. We respectfully point out that we had, in fact, in a supplemental brief filed July 28, 1986, included the statement, "For a case ordering that back pay be paid by the Union to a supervisor, whose discharge was caused by the Union, see *Teamsters Local 610 v. National Labor Relations Board,* —— F.2d ——, 100 LRRM 3123 (CA8, 1979), granting enforcement of 236 NLRB No. 127." A copy of that published report was appended to that supplemental brief. Furthermore, the case of *Local 926, International Union of Operating Engineers v. Jones,* 103 S.Ct. 1453 (1983), cited and distinguished by the Court of Appeals at Page 9 of its opinion, also clearly shows that the Board will accept and process a charge from a supervisor against a union and has the authority to fashion a remedy including lost wages.

REASONS FOR GRANTING THE WRIT

The Court of Appeals of Tennessee has ruled that state law, not Federal law, is controlling in this Labor Relations case. This is in direct conflict with prior decisions of this Honorable Court, and falls squarely within Supreme Court Rule 10.1(C) in that the State Court has

decided a federal question in a way that conflicts with applicable decisions of this Court.

The significant harm wrought by this decision is that, not only this case, but future labor relations matters, in the state of Tennessee, may be governed by state law. Furthermore, if this State Court decision is published, it may be followed by Courts of other States.

As applied to the instant case, there are critical issues which, if Federal labor law applies under the doctrine of preemption, would be resolved in a different manner than if state law was applied. The primary issue is dismissal in its entirety because of the exclusive jurisdiction of the National Labor Relations Board. Other issues include the application of the six months statute of limitations under *DelCostello v. Teamsters,* 462 U.S. 151, 103 S.Ct. 2281 (1983), whether or not the Union owed any duty of fair representation to supervisors or is excused therefrom under the ruling in *Cooper, et al. v. General Motors Corp., et al.,* 651 F.2d 249 (CA5, 1981), that supervisors are, by the very nature of their positions, not members of the collective bargaining unit and can not be represented by a Union that represents rank and file employees, therefore, the Unions owe them no duty.

On the other hand, if the Union owes the duty of fair representation, Federal law holds that the fact that the Union may have been negligent is not an actionable wrong. As this Honorable Court stated in *United Steel Workers of America, AFL-CIO-CLC v. Rawson, et al.,* 495 U.S. 362, 110 S.Ct. 1904 (1990), "The courts have in general assumed that mere negligence, even in the enforcement of a collective bargaining agreement, would not state a claim for breach of the duty of fair representation, and we endorse that view today."

So, for each of these reasons, Respondents' Complaint should be dismissed and the Judgment of the Trial Court should be affirmed.

THE DOCTRINE OF PREEMPTION

As we understand the law on the subject, either of two elements may give rise to a finding of preemption. One is the fact, that if the court has to resort to determination of rights under a "labor contract", there is preemption and Federal Labor Law must be applied. The other element is, that, if the conduct of the defendant is arguably a violation of the Labor Management Relations Act, there is preemption. If the action complained of is within the exclusive jurisdiction of the National Labor Relations Board the Court action must be dismissed. If dismissal on that basis is not required, then Federal Labor Law must be applied which, in this case, would mandate dismissal on the basis of the six months statute of limitations as well as the merits because the Union, at most, was guilty of a mistake in judgment, not hostile discrimination, bad faith or arbitrary conduct.

Our contention is that the agreement entered into by and between Respondents and their employer McLean Trucking Company, is a contract that would have to be interpreted in order to render a decision on this case, and thus, under the ruling in *Retail Clerks International Association, Local Unions 128 and 633 v. Lion Dry Goods, Inc. et al.*, 369 U.S. 17, 82 S.Ct. 541 (1962), Federal Labor Law must be applied. For instance in that case, this Honorable Court held that contracts as used in Section 301 of the Act does include more than "collective bargaining agreements." This case might give a valid basis for the Respondents to sue McLean Trucking Company under Section 301 of the Act (29 U.S.C. 185), as their contract was between the Respondents as a group, organized in concerted activity, and McLean. Arguably, Respondents themselves constituted a Union, and entered into a contract with McLean. However, Petitioner was not a party to that contract. Therefore, the considerations between McLean and Respondents differ substantially from those existing between Respondents and Petitioner.

If the Plaintiffs contend that their agreement is not a labor contract, born of concerted activity, we respectfully refer to items 1, 21, 23, 29 and 31 of the Complaint filed in the Circuit Court (App., Page 19a), in which they state that it is an action for a breach of contract arising out of the employment relationship between Plaintiffs and McLean and that they joined together in a concerted effort, entered into a contract with officials of McLean and performed all the conditions of the contract of employment but that McLean breached the contract.

The issue of whether an agreement may be considered a contract for the purpose of federal jurisdiction under Section 301(29 U.S.C. 185), as well as the doctrine of preemption, was discussed in the very recent case of *In re General Motors Corp., et al.*, No. 92-2017, —— F.2d ——, 8 Individual Employment Rights Cases 1373 (BNA) (CA6, Sept. 1, 1993). That court concluded that an Employee Assistance Plan was a contract and the cause of action was preempted by Section 301.

As to the other element bringing about preemption, that is that the conduct of the Petitioner was arguably an unfair labor practice, this issue was discussed in *Local 926, International Union of Operating Engineers, AFL-CIO, et al. v. Jones*, 460 U.S. 669, 103 S.Ct. 1453 (1983). That case is remarkably similar to the instant case. In that case a supervisor brought suit against a union for tortious interference with and conspiracy with the employer to deprive the supervisor of his employment contract. The court pointed out that supervisors are expressly excluded from the definition of "employee" under the National Labor Relations Act. The court stated that, if the conduct that a State seeks to regulate or to make the basis of liability is actually prohibited or protected by the National Labor Relations Act, otherwise applicable State Law and procedures are ordinarily preempted. The Court pointed out that it was conceded that the State cause of action was preempted to the extent that it covered coercive influence on the employer and that Jones

had sought to prove a coerced discharge and breach of contract, the very claim that was concededly preempted. The Court also held that permitting State causes of action for non-coercive interference with contractual relationships to go forward in the State courts would continually require the State Court to decide in the first instance whether the union's conduct was coercive, and hence beyond its power to sanction, or non-coercive, and thus the proper subject of a State suit. The Court stated that the decision on such questions of Federal Labor Law should be resolved by the Board. The Court also stated, at Page 1462 of the Supreme Court Report, Page 682 of the U.S. Report, "Third, even if the Georgia law reaches non-coercive interference with contractual relationships, a fundamental part of such a claim is that the union actually caused the discharge and hence was responsible for the employer's breach of contract. Of course, this same crucial element must be proved to make out a Section 8(b)(1)(B) case: the discharge must be shown to be the result of union influence." At page 1462, the Court recognized the Board's "undoubted jurisdiction to decide the issue." The Court also discussed the case of *Ironworkers v. Perko*, 373 U.S. 701, 83 S.Ct. 1429 (1963). In its discussion of that case the Court stated, at Page 1459:

> "We concluded that Perko's common law cause of action was preempted because it was founded on conduct that for several reasons was arguably within the ambit of Section 7 or Section 8. First, Perko was discharged both as a superintendent and a foreman. Even conceding that the position of superintendent was supervisory and beyond the reach of the Act, the foreman's position was arguably non-supervisory and covered by the Act. Hence, Perko's discharge arguably violated the proscription of Section 8(b)(1)(A) against a union interfering with the protected rights of employees and that of Section 8(b)(2) against causing an employer to discriminate against an employee contrary to Section 8(a)(3). Second, the

> union arguably violated Section 8(b)(1)(A), since causing the discharge of a supervisor might coerce employees, who would fear meeting their supervisor's fate, into foregoing their Section 7 rights to engage in concerted action. Third, the union's conduct might also have violated Section 8(b)(1)(B), which prohibits unions from restraining or coercing "an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances." Perko, we concluded, may well have had sufficient grievance handling responsibilities to come within the realm of supervisors whose selection the Union could not dictate." Also, "The Union adds that Jones' cause of action threatens to punish the worker's arguably protected conduct in protecting non-coercively, the selection of people for supervisory positions, whether or not they entail collective bargaining responsibilities. For these reasons, the Union submits that Jones state court action is preempted. We agree."

The Court also concluded that not every supervisor is a "representative for the purpose of collective bargaining or the adjustment of grievances" for purpose of Section 8(b)(1)(B) but stated that it was at least arguable that this was the case; and it was for the Board, not the State Courts, to decide whether Jones was the kind of a supervisor who could invoke Section 8(b)(1)(B). The Court then stated:

> "We thus agree with the union and the Board that the union, if it was responsible for Jones' discharge, arguably coerced the company in the choice of its collective bargaining representative."

The *Jones* decision covers every question raised by the Tennessee Court of Appeals in its effort to distinguish the preemption decisions of this Honorable Court. The case clearly shows that the National Labor Relations Board will take jurisdiction of a charge, by a supervisor, against a union. Jones filed such a charge and the Regional Director investigated, then dismissed, the charge. In dis-

cussing this element of the case, this Honorable Court stated:

> "The Regional Director concluded that the Union had in no way been responsible for Jones' discharge. That same issue of causation would have been presented for decision had Jones's case come before the Board, just as the issue would recurringly be at the core of Section 8(b)(1)(B) cases. Despite the Regional Director's determination, and the Board's undoubted jurisdiction to decide the issue had a complaint issued, Jones sought to re-litigate the question in the state courts. The risk of interference with the Board's jurisdiction is thus obvious and substantial.
>
> We thus cannot agree that Jones' efforts to recover damages from the Union for interference with his contractual relationships with his employer was of only peripheral concern to the federal labor policy. Our decisions in *Perko* and its companion case, *Plumbers v. Borden*, 373 U.S. 690, 83 S.Ct. 1423, 10 L.Ed.2d 638 (1963), refute Jones' submission. They also foreclose any claim that Jones' action against the Union for interference with his job is so deeply rooted in local law that Georgia's interest in enforcing that law overrides the interference with the federal labor law that prosecution of the state action would entail."

Thus, contrary to the Court of Appeals' ruling, it is clear that Respondents could have filed a charge against the Union with the National Labor Relations Board, and the Board had undoubted jurisdiction to decide the issue, and, furthermore, the issue is not one which is of only peripheral concern to the federal labor policy. Also, in *Jones*, this Honorable Court held, at Page 1460, that the Board could order the union to reimburse the supervisor for his lost wages.

In, *Local 207, International Association of Bridge Structural and Ornamental Ironworkers Union, et al. v. Jacob Perko*, 373 U.S. 701, 83 S.Ct. 1429 (1963), the

plaintiff had filed a State Court action against the local union and certain of its officers for damages under State common law alleging that the defendants had caused him to be discharged and had prevented his subsequent employment as a foreman and superintendent. The Court stated, at Page 1432:

> "Second, even if it be assumed that Perko was not an employee but was solely a supervisor, there is sufficient probability that the matter would still have been cognizable by the Board so as to compel the relinquishment of State jurisdiction."

At Page 1433 the Court stated:

> "Moreover, if a union forces an employer to discharge a supervisor, such conduct may well violate Section 8(b)1(B) because it coerces the "employer" in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances". The Court further stated, "If so, it would surely be within the Board's power under Section 10(c) to order the union to reimburse the supervisor for lost wages." Also, "We do not, of course, intimate any view on the merits of any of the underlying substantive questions, that is, whether the union was guilty of a violation of the Act. It is enough to hold, as we do, that it is plain on a number of scores that the subject matter of this lawsuit "arguably" comes within the Board's jurisdiction to deal with unfair labor practices. We therefore conclude that the State must yield jurisdiction and the judgment below must be reversed."

Please compare the status of Respondents who, apparently, were at times employees and, at other times, perhaps supervisors, with the status of *Perko* and *Jones*, in which the term "fluctuating status" was used to describe his jobs.

The Court of Appeals of Tennessee attempts to distinguish *Jones* from the instant case but, in that case, as well as the instant case, the charge was that the actions

of the union caused the Plaintiff to be discharged. For instance, in Item 37 of the Complaint, Plaintiffs in the instant case state, "As a result of the actions of officials of Local 667, Plaintiffs have been damaged by loss of employment, salary and other associated benefits." Whether Petitioner's alleged conduct was coercive or non-coercive, intentional or a mistake of judgment, it is still, arguably, a violation of the Act and under *Jones* and *Perko,* is preempted.

In *Local 100, United Association of Journeymen and Apprentices v. H.N. Borden,* 373 U.S. 690, 83 S.Ct. 1423 (1963), the Court held that, in the absence of an overriding State interest such as that involved in maintenance of domestic peace, State Courts must defer to the exclusive competence of the National Labor Relations Board in cases in which the activity that is the subject matter of the litigation is arguably subject to the protection and prohibition of the National Labor Relations Act.

In discussing the doctrine of preemption in *Garner, et al. v. Teamsters, Chauffeurs and Helpers Local Union No. 776 (AFL), et al.,* 346 U.S. 485, 74 S.Ct. 161, 171, the Court stated:

> "We conclude that when Federal power constitutionally is exerted for the protection of public or private interests, or both, it becomes the supreme law of the land and cannot be curtailed, circumvented or extended by a State procedure merely because it will apply some doctrine of private right."

We have pointed out that the actions of the Union in the instant case, as alleged by the Plaintiffs, if true, would arguably be a violation of Section 8(b)1(A) or (B) of the Act. Another case cited by the Court of Appeals of Tennessee in its opinion, *San Diego Building Trades Council v. Garmon,* 359 U.S. 236, 245, 79 S.Ct. 773, 780 (1959) contains the statement:

> "If the Board decides, subject to appropriate Federal Judicial review, that conduct is protected by Sec-

tion 7 or prohibited by Section 8, then the matter is at an end and the States are ousted of jurisdiction." That opinion also contains the statement, "The governing consideration is that to allow the States to control activities that are potentially subject to Federal regulation involves too great a danger of conflict with National Labor policy." Another statement by the U.S. Supreme Court in that same case appears at Page 779 of 79 S. Ct. Reports and is, "It is not for us to decide whether the National Labor Relations Board would have, or should have, decided these questions in the same manner. When an activity is arguably subject to Section 7 or Section 8 of the Act, the States as well as the Federal Courts must defer to the exclusive competence of the National Labor Relations Board if the danger of State interference with national policy is to be averted." Also, "In the light of these principles the case before us is clear. Since the National Labor Relations Board has not adjudicated the status of the conduct for which the State of California seeks to give a remedy in damages, and since such activity is arguably within the compass of Section 7 or Section 8 of the Act, the State's jurisdiction is displaced."

Please compare this ruling with the instant case in which the National Labor Relations Board has not adjudicated the issue as to the Union as no charges were filed against the Union by the Respondents, but the activity of the Union is arguably within the compass of Section 7 or Section 8 of the Act, so the State's jurisdiction is displaced.

On the question of whether or not the Union's conduct might arguably be violative of the Act and thus preempted, our research has disclosed a number of cases. One such case is *American Broadcasting Companies, Inc., et al. v. Writers' Guild of America, West, Inc., et al.*; *Association of Motion Picture and Television Producers, Inc. v. Writers' Guild of America, West, Inc., et al.*; *National Labor Relations Board v. Writers' Guild of*

America, West, Inc., 437 U.S. 411, 98 S.Ct. 2423, 2432 (footnote 25), 57 L.Ed.2d 313 (1978). The Court enforced an order of the National Labor Relations Board based upon a finding that a Union had violated the National Labor Relations Act prohibition against coercing an employer in the selection of his representatives. The Court pointed out that the prohibition of the National Labor Relations Act against a labor organization restraining or coercing an employer in the selection of his representatives could be violated by attempting coercively to control the choice of the employer's representative before, as well as after, the representative had actually dealt with any grievances. The Board had found a violation of Section 8(b)(1)(B), which is the Section we contend could arguably be found to have been violated in the instant case and which, therefore, brings about preemption.

In the instant case the initial letter demanding recognition in April of 1983, written by C. R. Boyd, demands that Respondents be included in an existing unit covered by the National Master Freight Agreement. Appendix, Page 38a Infra. The case of *Carpenters' Locals 944 and 235, United Brotherhood of Carpenters and Joiners, AFL-CIO and Woelke and Romero Framing, Inc.*, 239 NLRB No. 40 (1978), clearly shows that an attempt to represent supervisors or include them in an existing bargaining unit is a violation of 8(b)(1)(B). In that case, the unions were attempting to include foremen in the collective bargaining unit. The National Labor Relations Board stated, in the last paragraph of that decision:

> "Section 8(b)1(B) of the Act makes it an unfair labor practice for a labor organization or its agents to restrain or cocerce an employer in the selection of its representatives for the purposes of collective bargaining or the adjustment of grievances. Since enactment of this provision in 1947, the Board has consistently held that strikes to compel employers to select their foremen from within the ranks of the

> union are clearly proscribed. *More recent Board decisions confirm that the mere attempt by unions to compel inclusion of statutory supervisors within the collective bargaining unit is, without more, violative of 8(b)(1)(B) of the Act.*" (Emphasis Supplied)

The Board concluded that the respondent unions had violated that section of the Act. This is precisely the construction to be applied to the alleged facts in the instant case. Mr. Boyd's letter of April 11, 1983 clearly shows a demand that Respondents be included in a unit of office clerical employees covered by the National Master Freight Agreement.

Although the facts of the instant case are different somewhat from those in *Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, etc., et al. v. Wilson P. Lockridge,* 403 U.S. 274, 91 S.Ct. 1909 (1971), and, bearing in mind that Respondents, and not the Petitioner, had entered into a contract with McLean Trucking Company, the principles of law set out in that case apply to the instant case.

Pointing out that a State Court might have jurisdiction of a cause of action against a union when that union is a party to a collective bargaining agreement and its breach of duty constituted unfair representation, the Court held the case to be preempted. Lockridge contended that, as a result of the actions of the union, he was wrongfully deprived of employment and that his suspension from membership in the union was in violation of the union's constitution and general laws, which constituted a contract between the union and the complainant. This Honorable Court pointed out that, for the Plaintiff to make out a claim, he must have proved "arbitrary or bad faith conduct on the part of the union," and that there must be, "substantial evidence of fraud, deceitful action or dishonest conduct." At Page 299 of the United States Re-

port or Page 1924 of the Supreme Court Report the Court added, "Whether these requisite elements have been proved is a matter of Federal Law."

While discussing Section 301 suits, the Court, at 403 U.S. 300, 91 S.Ct. 1925 stated:

> "The legislative determination that Courts are fully competent to resolve labor relations disputes through focusing on the terms of a collective bargaining agreement cannot be said to sweep within it the same conclusion with regard to the terms of union-employee contracts that are said to be implied in law. That is why the principle of *Smith v. Evening News* is applicable only to those disputes that are governed by the terms of the collective-bargaining agreement itself."

Thus, it seems that if the Petitioner and McLean had been parties to a collective bargaining agreement covering the Respondents and Respondents had been terminated as a result of bad faith on the part of the Petitioner in its administration of that collective bargaining agreement, preemption might not apply. That is not what we have in the instant case. If the contract in this case between Respondents and McLean qualifies as a contract under the Labor Management Relations Act, it is solely between those two parties and not Petitioner. So, while jurisdiction might lie in the Courts as to McLean, it does not as to Petitioner. In any event, Federal labor law must be applied and the case dismissed.

There are two other cases decided by this Honorable Court that have bearing on the issues here. Both were cited to the Court of Appeals of Tennessee. They are *International Longshoremen's Association, AFL-CIO v. Larry Davis,* 476 U.S. 380, 106 S.Ct. 1904 (1986), and *Beasley v. Food Fair of North Carolina, Inc.,* 416 U.S. 653, 94 S.Ct. 2023 (1974).

In its opinion, the Court of Appeals of Tennessee stated:

> "On the face of it, it would seem that because the Plaintiffs are supervisory employees and not subject to the Federal Labor Relations Act, no activity either by the employer or the union directed toward them can be either protected or prohibited by the Federal Act.
>
> However, two decisions of the Supreme Court of the United States hold to the contrary."

The Court of Appeals of Tennessee then discussed Beasley, supra, and *Local 926, International Union of Operating Engineers v. Jones*, 103 S.Ct. 1453 (1983). That case and the Perko case, also cited by the Court of Appeals, contain the very contention we have made throughout this proceeding. That is that the Board can take jurisdiction of a charge against the Union when its activity results in discharge of a supervisor and can award backpay if the union violated the Act. The Court of Appeals found the Jones decision to be distinguishable and concluded there was no preemption at the same time stating that there had been no suggestion what relief, if any, could be granted under the Act or other Federal regulations.

International Longshoremen Association v. Davis, supra, is a case with some facts being similar to the allegations in the instant case. Other facts present in the instant case were not present in *Longshoremen v. Davis.* For instance, in *Longshoremen v. Davis,* the Union did not raise the issue of preemption until after a verdict had been rendered against it. We read this Honorable Court's decision in that case as holding that, had adequate proof been presented, the doctrine of preemption would have been applied. We do not have that problem in the instant case. Respondents have clearly pled and given affidavits to the effect that Petitioner interfered with the employment relationship. This, if true, would be a violation of the Act. Respondents have charged Petitioner with a breach of fiduciary duty, fraud, misrepresentation, and

deceit, which, in the context of a duty of representing in good faith, would be violations of the Act. Attempting to coerce the employer in the selection of its representatives is a violation of the Act, especially when there is an attempt to include them in an existing unit of rank and file employees.

Furthermore, at the time they applied for membership, Respondents were not supervisors. Even when they re-applied in August of 1983, they contended that they were employees and not supervisors. This date, not the date of the final decision of the Board or the General Counsel, should be the controlling date in determining whether or not they arguably were employees within the preemption doctrine as set out in the prior decisions, including *Longshoremen v. Davis,* supra. Respondents and Petitioner have always asserted that they were not supervisors but that the Company surreptitiously manufactured evidence to make it look as though they were supervisors.

We respectfully contend that the Court of Appeals of Tennessee erroneously concluded that the cause of action in this case is not "arguably" preempted. In *Marine Engineers Beneficial Association et al. v. Interlake Steamship Company, et al.,* 370 U.S. 173, 82 S. Ct. 1237 (1962), this court stated, "In *San Diego Building Trades Council, etc. v. Garmon,* 359 U.S. 236, 79 S. Ct. 773, 3 L.Ed.2d 775, this court held that the proper administration of the Federal law requires State courts to relinquish jurisdiction not only over those controversies actually found to be within the jurisdiction of the National Labor Relations Board, but also over litigation arising from activities which might arguably be subject to that agency's cognizance. Only such a rule, the court held, will preserve for the Labor Board "its Congressionally delegated function of deciding what is and what is not within its domain." Applied to the instant case, it was for the Labor Board, not the State Court of Tennessee, to decide whether Respondents could file a charge and have it processed before

the Board and be awarded relief if Petitioner was found to be in violation of the Act.

It is therefore clear that the elements which bring about preemption are present in the instant case. There is a contract between a group of dispatchers, acting in concert, and an Employer within the terms of the National Labor Relations Act. This brings the controversy concerning the contract within the ambit of Section 301 of the Act (29 U.S.C. 185). Federal labor law must be applied and that requires that the case be dismissed on the statute of limitations because Respondents did not file their suit within six months of the time they were discharged.

Additionally, Respondents' cause of action against Petitioner is, not only arguably, but clearly, within the Act, if true. Respondents' Complaint charges the failure to represent in good faith. The Complaint charges unlawful interference by Petitioner with the Employer's selection of its representatives for the purposes of adjustment of grievances and bargaining. Affidavits and exhibits before the Trial Court show that Petitioner was trying to include Respondents in an existing unit of rank and file employees which the Board has determined to be a violation of the Act. It seems to be beyond doubt that the actions charged against Petitioner by Respondents are within the jurisdiction of the National Labor Relations Board to remedy and that the Trial Court was, therefore, correct in dismissing the Complaint on the basis of preemption as being within the exclusive jurisdiction of the National Labor Relations Board. Furthermore, with Federal labor law being applied to the action, the Complaint is barred by the six months statute of limitations.

CONCLUSION

The petition for a writ of certiorari should be granted, the decision of the Court of Appeals of Tennessee Western Section at Jackson reversed, and the cause dismissed.

Respectfully submitted,

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Counsel for Petitioner

APPENDICES

APPENDICES

APPENDIX A

IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT JACKSON

SHELBY LAW #81

A. PETER THORNE, STEVEN M. BROOKSHAW, BILL CHISM, OTIS L. WHEELER, TERRY GLASER, GERALD KELLY and BILL NUTT,
Plaintiffs-Appellants

v.

MCLEAN TRUCKING COMPANY and LOCAL 667 (A Union affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America),
Defendants-Appellees

From the Circuit Court of Shelby County, Tennessee
Honorable James M. Tharpe

Donald A. Donati of Memphis for Plaintiffs-Appellants.

Russel L. Cherry of Memphis for McLean Trucking Company.

Howard R. Paul of Memphis for Teamsters Local 667.

VACATED AND REMANDED AS TO LOCAL 667.

Opinion filed.: Apr. 29, 1993

GODDARD, J.

CRAWFORD, J. (Concurs)

HIGHERS, J. (Concurs)

A. Peter Thorne, Steven M. Brookshaw, Bill Chism, Otis L. Wheeler, Terry Glaser, Gerald Kelly, and Bill Nutt, former employees of McLean Trucking Company, sue the Trucking Company and Local Union 667, affiliated with the International Brotherhood of Teamsters, for damages resulting from their employer terminating their employment. The suit against McLean alleged fraud, deceit, misrepresentation, as well as breach of contract. The suit against Local 667 was predicated upon false statements, made either knowingly or recklessly without regard to their truth, relied upon to the Plaintiffs' detriment.

The Trial Court sustained both Defendants' motions for summary judgment on the ground that the Federal Labor Law pre-empted state court jurisdiction, thus presenting a narrow question for our review.[1]

After oral argument in this Court in October 1985 and before an opinion was rendered, McLean filed a petition under Chapter 11 of the Bankruptcy Act, which served to stay any further proceedings in this Court.

The Bankruptcy Judge recently, on February 4, 1993, entered an order permitting the suit to continue as to Local Union 667. We accordingly will proceed to dispose of the Plaintiffs' claim against the Local Union.

The record, including the depositions and undenied allegations, viewed in the light most favorable to the Plaintiffs, discloses the following.

The Plaintiffs were all dispatchers employed by McLean on April 7, 1983, when McLean implemented a new

---

[1] The Defendants attempted to raise other issues in their appellate briefs. However, their motions for this Court to consider them have heretofore been denied.

work schedule which required them to work seven days and then be off seven days. Because of the dispatchers' dissatisfaction with the work schedule, some of the Plaintiffs approached Local 667 about becoming members. The officials of the Local advised the Plaintiffs that an election would be held and that there would be no serious repercussions for them signing a union authorization card. They also advised the Plaintiffs that if they were fired or disciplined the National Labor Relations Board would reverse any such action. Based upon these representations the Plaintiffs signed the authorization forms authorizing Local 667 to petition for an election.

About a month thereafter, a district manager for McLean approached Plaintiff Thorne and stated he would "do anything to get out of the problem." A meeting was then held between the dispatchers and management after assurance by the District Manager that he had the authority of the vice-president of the Southwest Division to resolve the problem.

After hearing the Plaintiffs' objections to the new work schedule the District Manager stated that the work schedule was his idea and he could change it "right now." He further told the Plaintiffs that it would be his decision whether to reinstate the schedule in the future and he promised he would not reinstate it if the Plaintiffs withdrew the Union authorization cards. After the Plaintiffs expressed a concern relative to retaliatory action the District Manager stated there would be none whatsoever for signing union authorization cards. When he was questioned specifically regarding what protection, if any, the dispatchers would be afforded after the cards had been withdrawn and the schedule reinstated, McLean's Director of Labor Relations responded by stating that "You know your way to the Union Hall and you can sign new cards." In response to the Plaintiffs' request the Company officials gave assurance to the Plaintiffs in a letter which reads as follows:

> The Company realizes that there have been several problems in the Road Dispatch Office in Memphis, Tennessee involving lack of communications and in general working conditions. As a result of these above problems, a number of the Supervisors approached the Local Union and requested representation.
>
> On Friday, April 15, a meeting was held at the Memphis terminal attended by the parties above. As a result of this meeting, the Company, McLean Trucking Company, and its management, has made assurances that no retaliatory action will be taken against any of the parties involved in the signing of these cards now or in the future.[2] The Company further agrees, as the National Labor Relations Board laws dictate, that these parties have further assurances of this as prescribed by law.
>
> None of the information that has transpired through this meeting or through these employees' efforts will be placed in their personnel files at any times [sic].

Because of these assurances the Plaintiffs agreed to withdraw the union authorization cards.

Some four months later, in August 1983, McLean reinstated the work schedule contrary to their previous agreement. The reinstatement of the work schedule prompted the Plaintiffs to again sign authorization cards with Local 667. Whereupon, McLean terminated the Plaintiffs. The Plaintiffs were never advised that it would be considered disloyal to sign union authorizations or they would be discharged if cards were signed. To the contrary the Plaintiffs were assured verbally that they would not be discharged.

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[2] McLean contends the words "now or in the future" modifies "retaliatory action" rather than "signing of these cards." However, as it is placed after "cards" rather than "retaliatory action," we believe McLean's construction is subject to doubt.

Less than a month later, an agent for Local 667 filed an Unfair Labor Practice charge against McLean on behalf of the Plaintiffs with the National Labor Relations Board. Upon considering the charge the Board determined that the Plaintiffs were supervisory employees and not subject to the Act.[3] The appeal which was perfected to the General Counsel of the NLRB was denied.

The leading case on the subject of pre-emption is *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 245, 79 S.Ct. 773, 780 (1959), wherein the Court stated the following:

> To require the States to yield to the primary jurisdiction of the National Board does not ensure Board adjudication of the status of a disputed activity. If the Board decides, subject to appropriate federal judicial review, that conduct is protected by § 7, or prohibited by § 8,[4] then the matter is at an

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[3] *29 U.S.C.A. 152.*

When used in this subchapter—

. . . .

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

[4] *29 U.S.C.A. 158.*

(a) It shall be an unfair labor practice for an employer—

end, and the States are ousted of all jurisdiction. Or, the Board may decide that an activity is neither protected nor prohibited, and thereby raise the question whether such activity may be regulated by the States. However, the Board may also fail to determine the status of the disputed conduct by declining to assert jurisdiction, or by refusal of the General Counsel to file a charge, or by adopting some other disposition which does not define the nature of the activity with unclouded legal significance. This was the basic problem underlying our decision in *Guss v. Utah Labor Relations Board*, 353 U.S. 1, 77 S.Ct. 598, 609, 1 L.Ed.2d 601. In that case we held that the failure of the National Labor Relations Board to assume jurisdiction did not leave the States free to regulate activities they would otherwise be precluded from regulating. It follows that the failure of the Board to define the legal significance under the Act of a particular activity does not give the States the power to act. In the absence of the Board's clear determination that an actitvity is neither protected nor prohibited or of compelling precedent applied to

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(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

. . . .

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.

29 U.S.C.A. 157.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

> essentially undisputed facts, it is not for this Court to decide whether such activities are subject to state jurisdiction. The withdrawal of this narrow area from possible state activity follows from our decisions in *Weber*[5] and *Guss*. The governing consideration is that to allow the States to control activities that are potentially subject to federal regulation involves too great a danger of conflict with national labor policy.

Later cases have carved out certain exceptions, one of which is *Farmer v. United Brotherhood of Carpenters and Joiners of America, Local 25*, 430 U.S. 290, 97 S.Ct. 1056 (1977), wherein the Court permitted a state action for outrageous conduct against a union. In discussing the various exceptions the Court stated the following (430 U.S. at 295; 97 S.Ct. at 1061):

> The doctrine of pre-emption in labor law has been shaped primarily by two competing interests. On the one hand, this Court has recognized that "the broad powers conferred by Congress upon the National Labor Relations Board to interpret and to enforce the complex Labor Management Relations Act . . . necessarily imply that potentially conflicting 'rules of law, of remedy, and of administration' cannot be permitted to operate." *Vaca v. Sipes*, 386 U.S. 171, 178-179, 87 S.Ct. 903, 910, 17 L.Ed.2d 842 (1967), quoting *San Diego Bldg. Trades Council v. Garmon*,[6] *supra*, at 242, 79 S.Ct. at 778. On the other hand, because Congress has refrained from providing specific directions with respect to the scope of pre-empted state regulation, the Court has been unwilling to "declare pre-empted all local regulation that touches or concerns in any way the com-

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[5] *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468, 75 S.Ct. 480 (1955).

[6] 359 U.S. 236, 79 S.Ct. 773 (1959).

plex interrelationships between employees, employers, and unions. . . ." *Motor Coach Employees v. Lockridge, supra,* at 289, 91 S.Ct., at 1919. Judicial experience with numerous approaches to the pre-emption problem in the labor law area eventually led to the general rule set forth in *Garmon, supra,* at 244, 79 S.Ct. at 779, and recently reaffirmed in both *Lockridge supra,* at 291, 91 S.Ct. at 1920, and *Machinists v. Wisconsin Emp. Rel. Comm'n,* 427 U.S. 132, 138-139, 96 S.Ct. 2548, 2552, 49 L.Ed.2d 396 (1976):

> "When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law." 359 U.S., at 244, 79 S.Ct., at 779.

But the same considerations that underlie the *Garmon* rule have led the Court to recognize exceptions in appropriate classes of cases. We have refused to apply the pre-emption doctrine to activity that otherwise would fall within the scope of *Garmon* if that activity "was a merely peripheral concern of the Labor Management Relations Act . . . [or] touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act." *Id.,* at 243-244, 79 S.Ct., at 779. See, *e.g., Linn v. Plant Guard Workers,* 383 U.S. 53, 86 S.Ct. 657, 15 L.Ed.2d 582 (1966) (malicious libel); *Automobile Workers v. Russell,* 356

> U.S. 634, 78 S.Ct. 932, 2 L.Ed.2d 1030 (1958) (mass picketing and threats of violence); *Machinists v. Gonzales,* 356 U.S. 617, 78 S.Ct. 923, 2 L.Ed.2d 1018 (1958) (wrongful expulsion from union membership). We also have refused to apply the pre-emption doctrine "where the particular rule of law sought to be invoked before another tribunal is so structured and administered that, in virtually all instances, it is safe to presume that judicial supervision will not disserve the interests promoted by the federal labor statutes." *Motor Coach Employees v. Lockridge, supra, at* 297-298, 91 S.Ct. at 1923. See *Vaca v. Sipes, supra* (duty of fair representation cases).

A still later case, *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters,* 436 U.S. 180, 98 S.Ct. 1745 (1978), allowed a state action by an employer against a union for a trespass. In that case the Supreme Court stated the following (436 U.S. at 196; 98 S.Ct. at 1757):

> The Court identified those factors which warranted a departure from the general pre-emption guidelines in the "local interest" cases. Two are relevant to the arguably *prohibited* branch of the *Garmon* doctrine. First, there existed a significant state interest in protecting the citizen from the challenged conduct. Second, although the challenged conduct occurred in the course of a labor dispute and an unfair labor practice charge could have been filed, the exercise of state jurisdiction over the tort claim entailed little risk of interference with the regulatory jurisdiction of the Labor Board. Although the arguable federal violation and the state tort arose in the same factual setting, the respective controversies presented to the state and federal forums would not have been the same.

> The critical inquiry, therefore, is not whether the State is enforcing a law relating specifically to labor relations or one of general application but whether the controversy presented to the state court is identical to (as in *Garner*)[7] or different from (as in *Farmer*) that which could have been, but was not, presented to the Labor Board. For it is only in the former situation that a state court's exercise of jurisdiction necessarily involves a risk of interference with the unfair labor practice jurisdiction of the Board which the arguably prohibited branch of the *Garmon* doctrine was designed to avoid.

On the face of it it would seem that because the Plaintiffs are supervisory employees and not subject to the Federal Labor Relations Act, no activity either by the employer or the Union directed toward them can be either protected or prohibited by the Federal Act.

However, two decisions of the Supreme Court of the United States hold to the contrary. In *Beasley v. Food Fair of North Carolina, Inc.*, 416 U.S. 653, 94 S.Ct. 2023 (1974), a supervisory employee who was terminated for attempting to join the union was denied the right to sue his employer under North Carolina's Right to Work Act because the Federal Statute does not authorize such employees to organize absent consent by the employer. Although the case does not use the word "pre-emption," the Court concurred in the finding of the Supreme Court of North Carolina that the Right to Work Law contravened the congressional objective, and in doing so, stated (416 U.S. at 657; 94 S.Ct. at 2026):

> [T]he North Carolina Supreme Court concluded that §§ 95-81 and 95-83 of the State's right-to-work law contravened the congressional objective. That court held: "To permit a state law to deprive an employer of his right to discharge his supervisor for member-

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[7] *Garner v. Teamsters*, 346 U.S. 485, 74 S.Ct. 161 (1953).

> ship in a union would completely frustrate the congressional determination to leave this weapon of self-help to the employer." 282 N.C., at 541, 193 S.E. 2d, at 918.
>
> . . . .
>
> . . . We conclude, therefore, that the second clause of § 14(a) relieving the employer of obligations under "any law, either national or local, relating to collective bargaining" applies to any law that requires an employer "to accord to the front line of management the anomalous status of employees." S.Rep. No. 105, *supra,* at 5. Enforcement against respondents in this case of §§ 95-81 and 95-83 would plainly put pressure on respondents "to accord to the front line of management the anomalous status of employees," and would therefore flout the national policy against compulsion upon employers from either federal or state agencies to treat supervisors as employees.

The other case is *Local 926, International Union of Operating Engineers v. Jones,* 103 S.Ct. 1453 (1983). In that case the plaintiff, a supervisor, as are the Plaintiffs in this case, was held not entitled to pursue a state action which alleged he was discharged because of illegal interference with his employment contract by the union. In reaching its conclusion the Court, referring to an earlier case of *Local No. 207, International Association of Bridge, Structural and Ornamental Iron Workers Union v. Perko,* 373 U.S. 701, 83 S.Ct. 1429 (1963), stated (at page 1459):

> We concluded that Perko's common-law cause of action was preempted because it was founded on conduct that for several reasons was arguably within the ambit of § 7 or § 8. First, Perko was discharged both as a superintendent and a foreman. Even conceding that the position of superintendent was supervisory and beyond the reach of the Act, the fore-

> man's position was arguably non-supervisory and covered by the Act. Hence, Perko's discharge arguably violated the proscription of § 8(b)(1)(A) against a union interfering with the protected rights of employees and that of § 8(b)(2) against causing an employer to discriminate against an employee contrary to § 8(a)(3). Second, the Union arguably violated § 8(b)(1)(A), since causing the discharge of a supervisor might coerce employees, who would fear meeting their supervisor's fate, into foregoing their § 7 rights to engage in concerted action. Third, the Union's conduct might also have violated § 8(b)(1)(B), which prohibits unions from restraining or coercing "an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances." Perko, we concluded, may well have had sufficient grievance-handling responsibilities to come within the realm of supervisors whose selection the Union could not seek to dictate.

In *Jones*, the Supreme Court noted, apparently with some significance, that unlike the case against the employer here, the claim was not rejected because the Board lacked jurisdiction. In the case at bar no complaint was made by the Plaintiffs against the Union to the National Labor Relations Board.

Notwithstanding the fact that the Board has not determined it lacked jurisdiction of the Plaintiffs' claim against the Union, we are nevertheless persuaded that there is no pre-emption under the facts of the present case.

First, as already noted, as to the claim against the employer, the Board has specifically rejected jurisdiction. Moreover, we think the facts giving rise to the tort claim against the Union, misrepresentation, as distinguished from the facts giving rise to the claim in *Jones*, make the case distinguishable. To put it another way, we can see no way that a supervisory employee pursuing the tort

claims here asserted would impinge upon the Federal scheme of labor management relations.

Finally, we do not find the controversy as to the Union to be identical to a claim the Plaintiffs could pursue under the National Labor Relations Act, a circumstance which would preclude State action.[8]

In conclusion, we are unwilling to say that if the Plaintiffs have been mistreated in the manner they contend, they are without remedy.

For the foregoing reasons the judgment of the Trial Court granting a summary judgment to the Union is vacated and the cause remanded for further proceedings not inconsistent with the mandates of this opinion. Costs of appeal are adjudged against Local 667.

/s/ Goddard
GODDARD, J.

/s/ Crawford
CRAWFORD, J. (Concurs)

/s/ Highers
HIGHERS, J. (Concurs)

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[8] As previously noted, no claim was made to the National Labor Relations Board against the Union. However, the Union's brief does not suggest what relief, if any, could be granted under the Act or other Federal regulations, and we are disinclined to determine the question by searching through Federal Statutes ourselves.

APPENDIX B

IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT JACKSON

SHELBY LAW #81

A. PETER THORNE, STEVEN M. BROOKSHAW, BILL CHISM, OTIS L. WHEELER, TERRY GLASER, GERALD KELLY and BILL NUTT,
Plaintiffs-Appellants

v.

MCLEAN TRUCKING COMPANY and LOCAL 667 (A Union affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America),
Defendants-Appellees

ORDER

[Filed Apr. 29, 1993]

This cause came on to be regularly considered by the Court on the record and for the reasons stated in the Court's Opinion, of even date, it is Ordered that:

1. The judgment of the trial court granting a summary judgment to the defendant-appellee, Local 667, is vacated and the cause is remanded for such further proceedings not inconsistent with the mandates of the Opinion.

2. Costs of the appeal are assessed against defendant-appellee, Local 667, for which execution may issue, if necessary.

/s/ Goddard
GODDARD, J.

/s/ Crawford
CRAWFORD, J.

/s/ Highers
HIGHERS, J.

APPENDIX C

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

SHELBY LAW No. 81

A. PETER THORNE, STEVEN M. BROOKSHAW, BILL CHISM, OTIS L. WHEELER, TERRY GLASER, GERALD KELLY and BILL NUTT,
Appellees,

v.

McLEAN TRUCKING COMPANY and LOCAL 667 (A Union affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America),
Appellants.

ORDER

[Filed Sept. 7, 1993]

Upon consideration of the application for permission to appeal and the entire record in this cause, it is the decision of the Court that the application should be denied.

PER CURIAM

APPENDIX D

IN THE CIRCUIT COURT OF TENNESSEE
FOR THE THIRTIETH JUDICIAL CIRCUIT
AT MEMPHIS

No.: 08721-3 T. D.

A. PETER THORNE, STEVEN M. BROOKSHAW, BILL CHISM, OTIS L. WHEELER, TERRY GLASER, GERALD KELLY and BILL NUTT,
Plaintiffs,

vs.

MCLEAN TRUCKING COMPANY and LOCAL 667 (A Union affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America),
Defendants.

ORDER GRANTING MOTION
FOR SUMMARY JUDGMENT AS TO THE
DEFENDANT, TEAMSTERS LOCAL 667

This cause came on to be heard on motion of defendant Teamsters Local 667 for summary judgment or for judgment on the pleadings, upon affidavits and exhibits filed in the cause, briefs filed by the counsel for the parties, and upon statement of counsel in open Court from all of which the court finds that the motion is well taken and should be granted on the ground that the Federal Law preempts this Court from exercising further jurisdiction in this cause.

IT IS THEREFORE, BY THE COURT, ORDERED, ADJUDGED AND DECREED: that this cause be and it hereby is dismissed as to defendant Teamsters Local 667, said defendant's Motion for Summary Judgment having been granted on the issue of preemption.

Costs are assessed against the plaintiffs, for which let execution issue.

/s/ James M. Tharpe
Judge 2/8/85

/s/ Wanda Donati
(for) Don Donati
Donati and Gosnell, P.C.
Attorneys for Plaintiffs

/s/ Russel L. Cherry
Attorney for the Defendant
McLean

/s/ Howard R. Paul
Attorney for the Defendant
Teamsters Local 667

APPENDIX E

IN THE CIRCUIT COURT OF TENNESSEE
FOR THE FIFTEENTH JUDICIAL CIRCUIT
AT MEMPHIS

No. 08721 TD
Div. 3

A. PETER THORNE, STEVEN M. BROOKSHAW, BILL CHISM, OTIS L. WHEELER, TERRY GLASER, GERALD KELLY and BILL NUTT,
Plaintiffs,

vs.

MCLEAN TRUCKING COMPANY and LOCAL 667 (A Union affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America),
Defendants.

COMPLAINT

[Filed Aug. 28, 1984]

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1. This is an action for breach of contract arising out of employment relationship between Plaintiffs and Defendant McLean Trucking Company. This action further asserts that Defendant McLean has committed tort of fraud, misrepresentation and deceit, as well as retaliatory and wrongful discharge in violation of public policy. Defendant Local 667 is sued for breach of fiduciary duty and the tort of fraud, misrepresentation, and deceit.

2. Plaintiff, A. Peter Thorne, was at all times mentioned herein, a resident of Victoria, Mississippi. Plaintiff Thorne was employed as a dispatcher with McLean Trucking Company from September, 1972 until August 31, 1983 when he was wrongfully discharged.

3. Steven M. Brookshaw was, at all times mentioned herein a, resident of Memphis, Shelby County, Tennessee. Plaintiff Brookshaw was employed at McLean Trucking Company as a dispatcher from March, 1972 until August 31, 1983, when he was wrongfully discharged.

4. Bill Chism was, at all times mentioned herein, a resident of West Memphis, Arkansas. Plaintiff Chism was employed as a dispatcher with McLean Trucking Company or its predecessor from 1968 until August 31, 1983, when he was wrongfully discharged.

5. Otis Wheeler was, at all times mentioned herein, a resident of Memphis, Tennessee. Plaintiff Wheeler was employed as a dispatcher with McLean Trucking Company from 1973 until August 31, 1983, when he was wrongfuily discharged.

6. Terry Glacer was, at all times mentioned herein, a resident of Bartlett, Tennessee. Plaintiff Glaser was employed as a dispatcher with McLean Trucking Company and its predecesosr company from January, 1967 until August 31, 1983, when he was wrongfully discharged.

7. Gerald Kelly was, at all times mentioned herein a resident of Memphis, Tennessee. Plaintiff Kelly was employed as a dispatcher with McLean Trucking Company and its predecessor from October, 1967 until August 31, 1983, when he was wrongfully discharged.

8. Bill Nutt was at all times mentioned herein a resident of Memphis, Tennessee. Plaintiff Nutt was employed as a dispatcher with McLean Trucking Company from September, 1968 until August 31, 1983.

9. At all times mentioned herein, Defendant McLean Trucking Company was, and still is, a foreign corporation operating an interstate cartage business in Memphis, Tennessee, located at 3914 East Shelby Drive in Memphis, Tennessee.

10. At all times herein mentioned, Defendant Local 667 was, and still is, an unincorporated association operating as a labor union affiliated with the International Brotherhood of Teamsters, Chauffuers, Warehouseman and Helpers of America.

11. Prior to their employment with Defendant McLean Trucking Company, most Plaintiffs were individually employed. At the time that each Plaintiff left their positions to enter into employment with Defendant McLean Trucking Company or its predecessor, they were earning a salary and would have become entitled to certain employment benefits.

12. Defendant, McLean Trucking Company sought some of Plaintiffs to become employed with McLean. Plaintiffs left employment to go to work for McLean. Defendant McLean represented to Plaintiffs that such employment would be continuous and terminable only for just cause. In reliance upon this representation of Defendant McLean Trucking Company, some Plaintiffs became employed with McLean and resigned their respective employment positions. As a result of their resignations, Plaintiffs lost salaries and other benefits.

13. Plaintiffs worked in reliance upon the continued representation of employment with McLean. Plaintiffs devoted many years of working for Defendant. As a consequence of the reliance, Plaintiffs declined subsequent offers of employment made by other parties and refrained from seeking employment opportunities.

14. At the time of his hire, Plaintiff Thorne was receiving an annual compensation of $10,000. Plaintiff continued to diligently perform all the duties of his em-

ployment until his wrongful termination. At the time of his wrongful termination, Plaintiff was receiving a salary of $28,200 per annum. The term and duration of the salary and salary increases were on an annual basis.

15. At the time of his hire, Plaintiff Brookshaw was receiving an annual compensation of $8,840. Plaintiff continued to diligently perform all the duties of his employment until his wrongful termination. At the time of his wrongful termination, Plaintiff was receiving a salary of $28,200 per annum. The term and duration of the salary was on an annual basis.

16. At the time of his hire, Plaintiff Chism was receiving an annual compensation of $6,500. Plaintiff continued to diligently perform all the duties of his employment until his wrongful termination. At the time of his wrongful termination, Plaintiff was receiving a salary of $28,250 per annum. The term and duration of the salary was on an annual basis.

17. At the time of his hire, Plaintiff Wheeler was receiving an annual compensation of $9,000. Plaintiff continued to diligently perform all the duties of his employment until his wrongful termination. At the time of his wrongful termination, Plaintiff was receiving a salary of $28,250 per annum. The term and duration of the salary was on an annual basis.

18. At the time of his hire, Plaintiff Glaser was receiving an annual compensation of $5,000. Plaintiff continued to diligently perform all the duties of his employment until his wrongful termination. At the time of his wrongful termination, Plaintiff was receiving a salary of $28,250 per annum. The term and duration of the salary was on an annual basis.

19. At the time of his hire, Plaintiff Kelly was receiving an annual compensation of $5,740.00. Plaintiff continued to diligently perform all the duties of his em-

ployment until his wrongful termination. At the time of his wrongful termination, Plaintiff was receiving a salary of $28,500 per annum. The term and duration of the salary was on an annual basis.

20. At the time of his hire, Plaintiff Nutt was receiving an annual compensation of $8,220.00. Plaintiff continued to diligently perform all duties of his employment until his wrongful termination. At the time of his wrongful termination, Plainitff was receiving a salary of $27,000 per annum. The term and duration of the salary was on an annual basis.

21. On or about April, 1983, McLean Trucking Company changed working conditions for dispatchers at its Memphis operation. Plaintiffs were required to work a longer shift. Plaintiffs joined together in a concerted effort to protest the changes in working conditions. Plaintiffs made numerous efforts, including numerous meetings with McLean officials to correct the working conditions.

22. In April, 1983, some of the Plaintiffs approached officials of Local 667 concerning becoming members of the union and petitioning for an election so that the Local 667 would become the bargaining agent for Plaintiffs. Officials of Local 667 informed Plaintiffs that they could become members of the union, and by signing authorization cards an election would be held pursuant to the National Labor Relations Act which would be monitored by the National Labor Relations Board. Officials of Local 667 informed some Plaintiffs that there would be serious repercussions which would result from signing these cards and if Plaintiffs were fired or disciplined, the National Labor Relations Board would reverse any disciplinary action since such an action would constitute an unfair labor practice. Based upon the representations of Local 667, Plaintiffs signed authorization forms which authorized Local 667 to petition for an election.

23. In April, 1983, officials of McLean Trucking Company learned that authorization cards had been

signed by some Plaintiffs. A meeting was held on April 15, 1983 with Plaintiff and officials of McLean during which Defendant's official asked Plaintiffs to withdraw their petition for an election and the authorization cards. If they withdrew, McLean would change the working conditions. Defendant McLean, through his employees and officials, agreed that they would not displine Plaintiffs in any manner for signing union cards. Based upon the assurances of the Defendant, Plaintiffs withdrew the authorization and entered into a contract with officials of Defendant McLean, setting forth that there would be no disciplinary action as a result of signing union cards. A copy of the contract is attached hereto as Exhibit "A." Defendant McLean immediately reinstated the previous work schedule.

24. Beginning immediately after signing the agreement, Defendant McLean Trucking Company gave the appearance that Plaintiffs had some authority to discipline over-the-road truck drivers. As dispatchers, Plaintiffs dispatched road drivers of Defendant McLean to various points in the Southern section of the United States. Prior to April of 1983, Plaintiffs did not have the expressed or apparent authority to discipline road drivers. Defendant McLean Trucking Company intentionally and fraudulently took steps to give the appearance that Plaintiffs had the power to discipline road drivers so that the National Labor Relations Board would decline to hold an election in the future.

25. In August, 1983, Defendant McLean Trucking Company reinstituted the longer shifts and the more difficult working conditions which formed the subject of Plaintiff's original protest in March, 1983. Plaintiffs made numerous attempts to convince Defendant not to implement those working conditions, but Defendant refused. In August, 1983, Plaintiffs again signed authorization cards which authorized Local 667 to petition for an election. Prior to signing the authorization cards, officials of

Local 667 again unequivocally and, without any reservation, stated that no disciplinary action could be taken for signing the authorization cards and if disciplinary action was taken, the National Labor Relations Board would reverse such action and reinstate Plaintiffs with full back pay. Based upon the representations of employees and officials of Local 667, Plaintiffs signed authorization cards.

26. After signing the authorization cards, Defendant McLean Trucking Company terminated the employment of each Plaintiff for signing union cards. Plaintiffs were discharged on August 31, 1983.

27. After being discharged, Local 667 filed with the N.L.R.B. a petition for an election. The Board refused to have an election because Plaintiffs were considered supervisors.

28. At the time of their termination, and ever since, Plaintiffs have been ready, willing, and able to perform their duties as dispatcher. By reason of their termination, Plaintiffs ability to obtain comparable employment has been and will continue to be substantially impaired. Plaintiffs were terminated without severance allowance and denied salary and valuable benefits they would have otherwise been entitled to enjoy for the remainder of their working life, including, but not limited to, hospital plan benefits, comprehensive medical benefits, vacation benefits, disability benefits, pension and retirement benefits, bonus plan benefits, life insurance and Social Security. Plaintiffs have also suffered loss of self-esteem, confidence, have been humiliated and embarrassed and have lost reputation among their families, friends and fellow workers. Each Plaintiff has suffered damages in the sum of at least $1,000,000 individually.

COUNT I

29. Plaintiffs performed all terms and conditions of the contract of employment and have been and still are ready, willing, and able to continue such service. How-

ever, Defendant, McLean Trucking Company breached the annual contract of employment and without any right or cause whatsoever discharged Plaintiffs from employment and refused to permit their continued employment. Plaintiffs have individually been damaged as a result of the breach of contract in an amount of at least $1,000,000.

COUNT II

30. Plaintiffs repeat and allege each and every allegation set forth in the preceding paragraphs of Plaintiffs' Complaint, as if fully set forth at length herein.

31. The sole reason for discharging Plaintiffs was that they signed authorization cards with the union. Defendant McLean Trucking Company has breached the contract entered into on April 15, 1983. The actions of the Defendant in breaching said contract have resulted in damages to each of the Plaintiffs in the amount of at least $1,000,000.

COUNT III

32. Plaintiffs repeat and allege each and every allegation set forth in the preceding paragraphs of Plaintiffs' Complaint, as if fully set forth at length herein.

33. The terminations of Plaintiffs were without just and sufficient cause and, indeed, were taken in bad faith by Defendant McLean Trucking Company. Plaintiff's termination was caused solely by the malicious and intentional actions of Defendant McLean without just cause and in contravention of Plaintiff's contract rights and public policy. The actions of the Defendant were contrary to state and federal public policy. Defendant knew, or should have known, that the actions taken were false, malicious, willful and intended solely to harm Plaintiffs and to cause their termination. As a result of the wrongful discharge of Plaintiffs, each Plaintiff has been injured and suffered severe damages. Plaintiffs have been unable to find suitable comparable employment and their

ability to obtain such employment has been and will continue to be substantially impaired. Further, as a result of the actions of Defendant, Plaintiffs have been caused to suffer humiliation, anxiety, loss of self-esteem, nervousness, and loss of reputation. From all of which described above, Plaintiffs have individually been damaged by Defendants in the sum of at least $1,000,000.

COUNT IV

34. Plaintiffs repeat and reallege each and every allegation set forth in the preceding paragraphs of the Complaint, as if fully set forth herein.

35. Defendant McLean Trucking Company, acting through its officials, made representations that there would be no discharge of Plaintiffs or retaliatory action for signing the union authorization. Officials of Defendant McLean knew that the representations were false. Indeed, the statements were made by the Defendants knowing them to be false and intending to have Plaintiffs rely upon the representation in order to forego a union election which would have afforded them protection under the National Labor Relations Act. As a result of the false representations made by officials of McLean, Plaintiffs relied upon these representations and withdrew the union authorization cards. The actions of the Defendant constitute fraud, misrepresentation and deceit. As a result of the actions of the Defendant, Plaintiffs have individually suffered severe damages in an amount equal to at least $1,000,000.

COUNT V

36. Plaintiffs repeat and reallege each and every allegation set forth in the preceding paragraphs of the Complaint, as if fully set forth herein.

37. Defendant, Local 667 made statements and representations to Plaintiffs that if they signed union authorization cards, they would not be subjected to any reprisals

by the company and if reprisals were administered, the National Labor Relations Board would reverse all such actions. As a result of these representations, Plaintiffs signed the authorization for representation. When the statements were made to Plaintiffs, officials of Local 667 were acting as fiduciaries since a confidential relationship existed between the parties. The statements of officials of Local 667 were false and the statements were made by officials of Local 667 knowing them to be false, without a belief in their truth, or recklessly without regard to whether they were true or false. As a result of the actions of officials of Local 667, Plaintiffs have been damaged through loss of employment, salary, and other associated benefits. Further, as a result of the actions of officials of Local 667, Plaintiffs have been unable to find suitable, comparable employment and will continue to be unable to find suitable employment. Plaintiffs have suffered loss of income, humiliation, anxiety, loss of self-esteem, nervousness and loss of reputation as a result of the actions of Defendant, Local 667. As a direct result of the actions of Local 667 complained of herein, Plaintiffs have been individually damaged in the amount of at least $1,000,000.

WHEREFORE, PLAINTIFFS RESPECTFULLY PRAY that this case be filed and docketed and that a jury trial be held as soon as possible and that at said trial the following relief be granted:

1. That a judgment be entered against Defendant McLean Trucking Company for $1,000,000 in compensatory damages for each Plaintiff and $1,000,000 in punitive damages for each Plaintiff.

2. A judgment be entered against Defendant Local 667 in the sum of $1,000,000 in compensatory damages and $1,000,000 in punitive damages.

3. That Plaintiffs be awarded their costs and disbursements.

4. That Plaintiffs be awarded such other relief as justice demands.

Respectfully Submitted,

DONATI, DONATI, GOSNELL & STOCKTON

By: /s/ Donald A. Donati
by David Stockton
DONALD A. DONATI
Attorney for
66 N. Second Street
Memphis, TN 38103

EXHIBIT "A"

McLEAN TRUCKING COMPANY
Executive Office, 1920 West First Street
Winston-Salem, North Carolina
27104

Please Reply to

April 15, 1983

3914 E. Shelby Dr.
Memphis, TN 38118

Mr. Steve Brookshaw—Road Dispatch Supervisor—Memphis
Mr. Bill Chism—Road Dispatch Supervisor—Memphis
Mr. Michie Dortch—Road Dispatch Supervisor—Memphis
Mr. Terry Glaser—Road Dispatch Supervisor—Memphis
Mr. Gerald Kelly—Road Dispatch Supervisor—Memphis
Mr. Bill Marshall—Road Dispatch Supervisor—Memphis
Mr. Peter Thorne—Road Dispatch Supervisor—Memphis

Gentlemen:

The Company realizes that there have been several problems in the Road Dispatch Office in Memphis, Tennessee involving lack of communications and in general working conditions. As a result of these above problems, a number of the Supervisors approached the Local Union and requested representation.

On Friday, April 15, a meeting was held at the Memphis terminal attended by the parties above. As a result of this meeting, the Company, McLean Trucking Company, and its management, has made assurances that no retaliatory action will be taken against any of the parties involved in the signing of these cards now or in the future. The Company further agrees, as the National Labor Relations Board laws dictate, that these parties have further assurances of this as prescribed by law.

None of the information that has transpired through this meeting or through these employees' efforts will be placed in their personnel files at any times.

Respectfully,

MC LEAN TRUCKING COMPANY

/s/ W. R. Davidson
W. R. DAVIDSON
Director of Labor Relations

/s/ R. J. Koontz
R. J. KOONTZ
District Manager

/s/ Ray Harmeling
RAY HARMELING
Relay Manager

WRD/cg

APPENDIX F

IN THE CIRCUIT COURT OF TENNESSEE
FOR THE THIRTIETH JUDICIAL CIRCUIT
AT MEMPHIS

No. 08721 T.D.
Division 3

A. PETER THORNE, STEVEN M. BROOKSHAW, BILL CHISM, OTIS L. WHEELER, TERRY GLASER, GERALD KELLY and BILL NUTT,
Plaintiffs

v.

MCLEAN TRUCKING COMPANY and LOCAL 667 (A Union affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America),
Defendants

MOTION FOR JUDGMENT ON THE PLEADINGS
and/or SUMMARY JUDGMENT OF DISMISSAL

[Filed Oct. 9, 1984]

Defendant, Teamsters Local 667, moves for a Judgment in its favor on the pleadings in this cause.

Defendant further moves for a Summary Judgment of Dismissal.

For ground for said motions this defendant respectfully states that the complaint does not state a cause of action against it for which relief may be granted.

The defendant further states that the complaint is barred by the Statute of Limitations of six months contained in the National Labor Relations Act, as amended.

This defendant states that the cause of action is preempted by the National Labor Relations Act granting jurisdiction to the National Labor Relations Board, and that a final decision has issued from that board.

This defendant states that it has not been guilty of a breach of fiduciary duty because the only duty of the plaintiff would be that of a collective bargaining representative certified or recognized under the National Labor Relations Act and defendant has not been and is not the collective bargaining representative for the plaintiffs. This defendant relies on the pleadings in this cause together with the affidavit of Duria Jones attached hereto.

Defendant, Teamsters Local 667, therefore moves that the complaint against it in this cause be dismissed on the pleadings, or, in the alternative, a Summary Judgment of Dismissal be granted.

/s/ Howard R. Paul
HOWARD R. PAUL
Attorney for Defendant/
Teamsters Local 667
1107 Sterick Bldg.
Memphis, Tn. 38103
(901) 526-7070

[Certificate of service Omitted in Printing]

APPENDIX G

IN THE CIRCUIT COURT OF TENNESSEE
FOR THE THIRTIETH JUDICIAL CIRCUIT
AT MEMPHIS

No. 08721-3 T.D.

A. PETER THORNE, STEVEN M. BROOKSHAW, BILL CHISM, OTIS L. WHEELER, TERRY GLASER, GERALD KELLY and BILL NUTT,
Plaintiffs

v.

MCLEAN TRUCKING COMPANY and LOCAL 667 (A Union affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America),
Defendants

AFFIDAVIT OF R. JACK KOONTZ

[Filed Dec. 17, 1984]

STATE OF NORTH CAROLINA)
)
COUNTY OF MECKLENBURG)

I, R. JACK KOONTZ, after having been first duly sworn, according to law, depose and state as follows:

1. That this Affidavit is given in support of the Memorandum of Law in Support of the Motion for Summary

Judgment of the Defendant, McLean Trucking Company, Inc., as filed in the above captioned case.

2. That I was employed as the District Manager for McLean Trucking Company, Inc. from 1980 to October of 1983.

3. That as part of my duties and responsibilties as District Manager, I was in charge of the line haul (over-the-road) operation, which included the dispatching of men and equipment.

4. That the Plaintiffs were employed as dispatchers with McLean. The Plaintiffs were not employed pursuant to any written employment agreement, and were paid a monthly salary.

5. That in April of 1983, I was involved in the negotiations concerning a labor dispute with the above referenced Plaintiffs.

6. That on April 15, 1983, I met with the Plaintiffs to discuss their problems. The major complaint of the Plaintiffs was their displeasure and opposition to the implementation of a new work schedule. The proposed schedule would require the Plaintiffs to work seven 12-hour shifts in a row and to be off seven days in a row.

7. That prior to the meeting, I was informed that the Plaintiffs had signed union authorization cards in their opposition to the proposed schedule. In the April 15, 1983 meeting with the Plaintiffs, I stated that if the Plaintiffs would withdraw the union authorization cards, that I would not implement the proposed schedule unless upper management required its implementation. I expressly stated throughout the meeting that if I was required by my superiors to implement the proposed work schedule, that I would do so. The Plaintiffs in turn stated that they understood my position, but that they would still be in opposition to the schedule and would take whatever steps

they felt necessary to oppose the work schedule's implementation.

I stated several times throughout the course of the meeting that the decision to implement the 7-on 7-off schedule was a district level decision made in order for the dispatcher work schedules to be uniform throughout the district. The dispatchers at the relay point at Baileyton had been on a 7-on 7-off shift since the relay was established in approximately 1980. The Nashville dispatchers were converted to a 7-on 7-off work schedule at the same time as the Memphis dispatchers. The only reason I was able to offer to return the work schedule to the previous hours was because the decision to change it in the first place had been mine. Had the policy been instituted on a higher corporate level, or should it ever be instituted as corporate policy, I would be prohibited from effecting any changes contrary to policy. Several dispatchers affirmed their understanding of my position through nodding of heads and statements to the effect that they understood I could not countermand corporate policy or prevent any future change in work schedules dictated from the corporate headquarters located at Winston-Salem, North Carolina. The dispatchers' position was that they would be in opposition to the schedule and would take whatever steps they felt necessary to oppose the work schedule's implementation.

8. That the Plaintiffs requested that W. R. Davidson, Ray Harmeling and myself draft a letter containing a representation that they would not be discharged for statements made by them in our meeting, as well as their filing of the union representation cards in April of 1983. The letter dated April 15, 1983, which has been attached as Exhibit "A" to their Complaint, was not intended as an employment contract, nor was it intended to guarantee the Plaintiffs' jobs in the event that they filed new union authorization cards. I specifically stated that I could guar-

antee that there would not be any retaliatory actions taken against them for their conduct in April of 1983. The dispatchers withdrew their authorization cards and performed their duties until August of 1983. In August of 1983, once the dispatchers had learned that the upper management had decided to implement the work schedule, they again voiced strong opposition to it and filed the union authorization cards.

9. That on or about August 22, 1983, the Plaintiffs were informed that the work schedule which had been the subject of the controversy in April of 1983, be implemented as prescribed by the upper management of McLean. The implementation of the work schedule was part of the overall company policy. The Plaintiffs were discharged on August 31, 1983, for opposing management's position concerning work schedules and for disloyalty to the company. The basis for the allegation of disloyalty to the company was from their attempt to join Local 667 of the Teamster's Union, which also represents the rank and file workers.

FURTHER AFFIANT SAITH NOT.

/s/ R. Jack Koontz
R. JACK KOONTZ

[Notary Omitted in Printing]

APPENDIX H

HIGHWAY AND LOCAL MOTOR FREIGHT
EMPLOYEES LOCAL UNION NO. 667
796 East Brooks Avenue, Memphis, Tennessee 38116/
396-5331

Affiliated with The
International Brotherhood of
Teamsters, Chauffeurs,
Warehousmen and Helpers
of America

Johnny Raney, Pres.
Howard F. Thornton,
Sec-Treas.

April 11, 1983

Certified Mail No. P 278 176 072
Return Receipt Requested

Mr. Bob Davidson
McLean Trucking Company
3914 East Shelby Drive
Memphis, TN

Dear Sir:

This letter is to notify you that a majority of your employees in the collective bargaining unit described below have designated Highway and Local Motor Freight Employes—Local 667, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America as their exclusive collective bargaining representative. In view of such designation, we demand recognition for purpose of collective bargaining, as the exclusive representative of such employees. The collective bargaining unit in which we demand recognition consist of all central and road dispatchers, excluding all super-

visory personnel, watchmen, guards and all others as defined by the Act.

We demand recognition per Article 2, Section 3, of the National Master Freight Agreement and Southern Conference Area Local Freight Forwarding Office Supplemental Agreement.

I will meet with you Monday, April 18, 1983 at 10:00 A.M. at the Local Union Office, 796 East Brooks, Memphis, Tennessee, for the purpose of signing the master freight contract, with a supplement describing their wages and duties. We are willing to permit a neutral person to check our authorization cards at the time of such meeting for the purpose of verifying our majority status.

In the event of any discrimination against any of your employees, because of their union activities, or in the event of your refusal to sign the contract with us, we will take prompt action to remedy such discrimination or refusal to sign said contract.

Yours truly,

/s/ C. R. Boyd
C. R. Boyd
Business Representative

CRB:jl

APPENDIX I

IN THE CIRCUIT COURT OF TENNESSEE
FOR THE FIFTEENTH JUDICIAL CIRCUIT
AT MEMPHIS

No. 08721-T. D.
Division III

A. PETER THORNE, STEVEN M. BROOKSHAW, BILL CHISM, OTIS L. WHEELER, TERRY GLASER, GERALD KELLY and BILL NUTT,
Plaintiffs

v.

MCLEAN TRUCKING COMPANY and LOCAL 667 (A Union affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America),
Defendants

AFFIDAVIT OF A. PETER THORNE

STATE OF TENNESSEE)
)
COUNTY OF SHELBY)

I, A. PETER THORNE, after having been first duly sworn according to law, depose and states as follows:

1. That this Affidavit is given in support of Plaintiff's Response and Memorandum in Opposition to the Motion for Summary Judgment filed by Defendants.

2. That I have read the Complaint and the information contained in the Complaint is true to the best of my knowledge, information, and belief.

3. That I and other Plaintiffs were given raises on an annual basis.

4. Local 667, a union affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, represents the over-the-road truck drivers, city drivers, dock workers, and office personnel, including clerks, telephone operators, billing clerks, and manifest clerks. Officials of Local 667 informed me in April that they represented dispatchers at other truck lines. Plaintiffs were dispatchers at McLean. In April 1983, some of the Plaintiffs approached Local 667 about representation.

5. At no time prior to September, 1983 did any official of McLean Trucking Company tell me or to my knowledge, any other dispatcher that we were considered supervisory personnel and exempt from union organizational efforts under the National Labor Relations Act. At no time did any official of Local 667 inform us that there was even a possibility that we would be considered supervisory personnel, and, therefore, exempt under the National Labor Relations Act. Indeed, Mr. Duria Jones and Johnny Rainey, each then officials of Local 667 assured me and other Plaintiffs that we would be covered and that other dispatchers like us were being represented by Local 667. At no time were we informed of a letter allegedly sent to Local 667 by William Robert Davidson, dated April 14, 1983 asserting that we were supervisor employees.

6. Beginning on or about April 7, 1983, the company implemented a new work schedule for dispatchers. The new schedule required us to work seven straight days and to allegedly be off seven days. The dispatchers did not want the schedule because it would result in a loss of sick leave days, vacation days, and there was no assurance that we would be allowed seven days off. When the schedule was implemented on or about April 7, 1983,

each Plaintiff was entitled to three or more weeks of vacation. The new work schedule would have resulted in the loss of this vacation. I and other Plaintiffs did not like the work schedule and voiced our opposition to it prior to its implementation on or about April 7, 1983.

7. On April 14, 1983, R. J. (Jack) Koontz approached me at work and stated that he would "do anything to get out of the problem" of dispatchers signing authorization cards with the union. R. J. Koontz was the district manager of McLean Trucking Company in the area which included portions Tennessee, Arkansas, Mississippi and Kentucky. Mr. Koontz suggested that a meeting be held to "find a way to get out of the problem" with the authorization cards. Prior to the meeting, Mr. Koontz told me that he had the authority of Mike Davis, Vice President of the Southwest Division of McLean Trucking Company to resolve this problem.

8. That on April 15, 1983, the meeting was held with Jack Koontz, Ray Harmeling (relay manager at the Memphis Terminal) and William Robert (Bob) Davidson, regional director of Labor Relations from McLean. Mr. Davidson's jurisdiction over union labor matters includes all McLean contractual employees in Texas, Oklahoma, Arkansas, Louisiana, Tennessee, Mississippi, and Kentucky. Also present at the meeting was me, Gerald Kelly, Bill Nutt, Bill Chism, Bill Marshall, and Terry Glaser.

9. That at the meeting, Plaintiffs stated they they did not like working under the new schedule because of loss of sick days, vacation days, and there were no assurances that Plaintiffs would be seven days off. Jack Koontz stated that the work schedule was his idea and that he could stop it "right now". He also stated that in the future, he would decide whether to reinstitute the schedule. Jack Koontz stated that he would not reinstitute it if we withdrew the union authorization cards. At this point, Plaintiffs were concerned about possible retaliation for signing the au-

thorization cards and redress if company breached an agreement not to change schedule. Mr. Koontz stated that there would be no retaliation whatsoever for signing the union cards. Mr. Davidson was asked what protection we had if the cards were withdrawn and the schedule is reinstated. Mr. Davidson stated that "you know your way to the union hall and you can sign new cards". Plaintiffs then wanted assurances that in the event company breached the agreement not to reinstate schedule that the dispatchers would have redress and would not be fired if new cards were signed. The officials gave the assurance. Based upon that assurance, Plaintiffs agreed to withdraw the authorization card provided the company officials would sign an agreement assuring that there would be no retaliation taken against Plaintiffs for signing the April authorization cards or other cards in the future. A memorandum was prepared by Mr. Davidson and signed in my presence on April 15, 1983 by these supervisory employees of McLean Trucking Company. The appropriate language in the agreement states that "no retaliatory action will be taken against any of the parties involved in signing these cards now or in the future and "that the Company further agrees as the National Labor Relations Board has dictated, that these parties have further assurance of this as prescribed by law". Based upon the verbal assurances as well as this language, Plaintiffs withdrew the union authorizations.

10. That at no time during April 15th meeting was it agreed that officials of the Memphis terminal could not guarantee that the schedule would not later be changed by upper management. On the contrary, it was expressly agreed to and stated by Mr. Koontz that he had developed a schedule, that it was his decision to develop a schedule and that he would not change it in the future.

11. That the April 15 agreement that was signed by the officials of McLean Trucking Company stated there would be no retaliatory action and it was clearly the

understanding of the parties that there would be no retaliation for signing the April cards or any cards in the future.

12. That on August 31, 1983, Plaintiffs were discharged. At no time were any of the Plaintiffs informed of the reasons why they were discharged. Plaintiffs were not given separation notices nor were Plaintiffs given letters of discharge.

13. That at no time were we informed by any supervisor that it would be considered disloyal to sign union authorization cards. At no time were we informed that we would be discharged if authorization cards were signed. Indeed, I was assured verbally and in writing that I would not be discharged for signing authorization cards.

/s/ A Peter Thorne
A. PETER THORNE

[Notary Omitted in Printing]